COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1335

CARE AND PROTECTION OF TONY.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The mother appeals from a judgment entered by a judge of the Juvenile Court finding her unfit to parent the child, and placing the child in the permanent custody of the Department of Children and Families (department).[2] Specifically, the mother contends that (1) the judge erred in finding the mother unfit because there was no nexus between the mother's mental health diagnosis and her ability to provide the child with minimally acceptable care; (2) the judge erroneously compared the child's progress in the mother's care to his progress in his current guardians' care; and (3) the judge abused his discretion by failing sua sponte to return the child to the mother's custody with court-imposed conditions. We affirm.

Background. We draw on the judge's detailed factual findings, which find ample support in the record. The mother

[1] A pseudonym.

[2] The father was also found unfit. He did not appeal, and he is not involved in these proceedings.

suffers from mental health disorders and most recently was diagnosed with bipolar disorder II. She also has a long history of unstable housing related, at least in part, to her long-term quests for unconventional cures for chronic medical issues she believed she and the child had but which appear untethered to any medical evidence in the record.[3] She has a lengthy history of involvement with the department, going back to 2002 when her eldest child, John (a pseudonym), was removed from her care after she attacked him with a baseball bat.[4] She also has had involvement with counterpart agencies in New Hampshire and Maine.

Most recently, in 2015, the department intervened to provide services to the mother and the child after receipt of two reports, pursuant to G. L. c. 119, § 51A, alleging the mother's neglect of the child. The reports indicated that the child's school asked the mother to have him evaluated due to

[3] In 2007, the mother believed she had an issue with her thyroid, although this was not supported by the mother's doctors. The mother then believed she was lacking in iodine and reported that her body turned "beet red," she had high blood pressure, and she was borderline diabetic. The mother ate two bags of shrimp, and reported that her symptoms then went away. She also believed the child had a thyroid condition, although there is no support for that diagnosis in the record.

[4] After John's removal, the maternal grandmother was granted a restraining order against the mother; the restraining order included John, then age fifteen, as a protected person. John is now an adult, and he and his girlfriend are the child's guardians.

concerning behavior at school, including the child defacing the walls of a building at school, coloring on himself with markers, and reporting hearing voices. During the child's evaluation, the mother presented as "manic, tangential and delusional." She refused to seek services for the child, stated that the school simply wanted to render the child "comatose," called the child stupid, and spoke of people breaking into her home and scratching her furniture. She was involuntarily hospitalized, and blamed the child for the hospitalization.

After an investigation, the department found the allegations of neglect supported. G. L. c. 119, § 51B. The mother denied any concerns regarding the child's behavior, stating that the allegations were part of a "plot" against her to put her into a psychiatric ward. She refused to sign the child's individualized education plan (IEP), and informed the department that she planned to take the child out of school. The mother also made suicidal statements. She refused medication for the child's attention deficit hyperactivity disorder (ADHD) or treatment for his behaviors. The mother was offered services at the Community Services Agency, South Bay Mental Health, and the Lahey Behavioral Health Clinic, but did not attend any of the programs consistently.

After multiple failed attempts to contact the mother by both the department and Lynn Police Department in July and

August 2015, the department filed a care and protection petition, pursuant to G. L. c. 119, § 24, and was granted temporary custody of the child. Following removal, the department instituted a service plan in order to assist the mother in developing her parenting skills. The mother failed to comply with her service plan tasks. She completed a psychological and parenting evaluation, but refused to provide it to the department; she also did not participate in therapy and parenting programs.[5]

A three-day trial was held in January and February 2018. At the time of trial, the child was thirteen years old and had been living with John and John's girlfriend since July 2017. See note 4, supra. The judge found the mother to be unfit and granted permanent custody of the child to the department.[6] This appeal followed.

Unfitness. A judge's "finding of unfitness must be supported 'by clear and convincing evidence, based on subsidiary

[5] The department referred the mother for therapy at Family Continuity in December 2015, but the mother never appeared and was terminated. The mother was then referred to a therapist for individual therapy; again, the mother was terminated for failure to regularly attend appointments. The mother testified that, contrary to the opinion of her therapist, she did not need therapy or medication to treat her bipolar disorder. The mother also met with a parent aide from a twelve-week parenting program (Journey Program), but refused to complete any tasks as part of the curriculum.

[6] The judge did not terminate the mother's parental rights.

findings proved by at least a fair preponderance of evidence.'" Adoption of Talik, 92 Mass. App. Ct. 367, 370 (2017), quoting Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). "While a decision of unfitness must be supported by clear and convincing evidence, a judge's findings will be disturbed only if they are clearly erroneous" (citation omitted). Adoption of Paula, 420 Mass. 716, 729 (1995). A judge's "finding is clearly erroneous when there is no evidence to support it, or when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Adoption of Talik, supra, quoting Custody of Eleanor, 414 Mass. 795, 799 (1993). The mother asserts that the judge's finding that she is unfit is unsupported because there is no nexus between her mental health, on the one hand, and her ability to provide the child with minimally adequate care, on the other. See, e.g., Adoption of Abby, 62 Mass. App. Ct. 816, 826 (2005) (determination of unfitness reversed where no evidence supported conclusion that mother was unfit because of psychological issues); Adoption of Katharine, 42 Mass. App. Ct. 25, 31-34 (1997) (parents' cocaine use did not render parents unfit where there was no history of abuse or neglect of children). We disagree.

The record supports the finding that the mother's mental health had a negative impact on her ability to meet the child's medical needs. See Adoption of Ramon, 41 Mass. App. Ct. 709, 717 (1996). As a result of the mother's mental health, the child was at times behind on immunizations and did not regularly attend medical appointments while in the mother's care. When the child was diagnosed with ADHD, the mother initially refused to provide the child with any medication, relented and gave the child medication, and then suspended the medication after only a few weeks when, in her estimation, it had not worked. In contrast, after the child was removed from her care and provided with the medication consistently, he improved socially and academically, as more fully set forth below. Despite these substantial developmental gains, the mother indicated she would only continue the medication if forced to do so.[7] See Adoption

[7] Regarding the mother's ability to provide the child with his ADHD medication if placed back in her care, the mother testified at trial as follows:

> Q.: "You've told the Department that you -- if you're forced to give him medication you would, but you don't agree that he should be on medication, right?"
>
> A.: "If the judge says yes, then I will respect the judge's wishes, yes."
>
> Q.: "Okay. But there is no order from any judge saying that you should give him medication, right?"
>
> A.: "So far it's out of my hands."

of Anton, 72 Mass. App. Ct. 667, 676 (2008) (if parent unwilling to obtain "medical care for a child, causing neglect of the child, it is relevant to finding of unfitness").

In addition, the mother's mental health hampered her ability to meet the child's educational needs. In 2008, while the child was attending a Head Start program, the mother believed, again without any basis, that he was being poisoned at the program and that "he is starving [there]," and threatened to withdraw him. At this time, the mother also reportedly said, "Some days I feel like hanging myself." In 2015, the mother refused to sign the child's IEP because she believed that the school "had a plot against" the child and wanted to render him "comatose" by medicating him. The mother again threatened to pull the child out of school.

The child's improvement in guardians' care. The mother asserts that the judge erred by comparing the child's condition in the mother's care with his condition in the guardians' care. While "[c]ustody is not to be transferred from the natural parent simply because another prospective custodian is thought

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Contrary to the mother's contention that she testified that she would willingly provide the child with his ADHD medication, based directly on the mother's prior conduct and her testimony, the judge found that if the child were to be placed back in the mother's care, she would only provide him with his ADHD medication if forced to do so despite the fact that the child had exhibited significant improvements socially and academically while taking the medication.

to be better qualified," Custody of a Minor, 389 Mass. 755, 765 (1983), a judge can contrast a child's condition prior to and after removal. See Adoption of Kimberly, 414 Mass. 526, 530-531 (1993) (judge properly considered children's improvement since living with grandparents compared to when in mother's care and correctly determined that department's proposed plan for grandparents to adopt children was in best interests of children).

Here, the judge appropriately considered the child's condition while in the mother's care, foster care, and the guardians' care in assessing the mother's ability to meet his needs. Specifically, the judge considered that, when the child was in the mother's care, he played mostly with children four to five years younger than him, was interested in toys meant for younger children, crawled on the floor, and was substantially behind his peers academically. The judge considered that the child's transition to foster care did not improve his condition, but that this could be attributable to the mother's warning to the child to "watch his back" and other inappropriate comments. The judge further considered that, after July 2017, when the child was placed in the care of his current guardians, he made significant advancements socially and academically. The child became educated about ADHD and actively managed his diet and medications. He made significant strides in school, improving

academically. He was able to play and speak in a more age-appropriate fashion. The judge did not err in considering this improvement. See Adoption of Kimberly, 414 Mass. at 530.

The mother's willingness to provide medication. The mother contends that the judge erred in concluding that if the child was transferred back to her care, the mother would likely not provide the child with his medication. Here, as discussed in note 7, supra, the record supports the judge's finding. See Adoption of Eleanor, 414 Mass. at 799. See also Adoption of Daniel, 58 Mass. App. Ct. 195, 200 (2003). Moreover, the mother had stopped providing the child with his medication in the past, did not believe he had ADHD, provided him with food that exacerbated his symptoms despite knowing that the snacks were inappropriate, and testified that she would only provide him the medication if forced to do so. See Adoption of Eleanor, supra. See also Adoption of Don, 435 Mass. 158, 166-167 (2001).

Court-imposed conditions. The mother contends that the judge abused his discretion by failing sua sponte to order the child returned to her custody with court-imposed conditions. We disagree. Where the mother never made a request at trial for court-imposed conditions, and provided no evidence of what court-imposed conditions would ensure that the child's needs would be met if he was returned to her care, the judge was not required to enter sua sponte the order the mother now requests.

See Adoption of Cadence, 81 Mass. App. Ct. 162, 170 (2012). See also Adoption of Hugo, 428 Mass. 219, 225-226 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999). We discern no abuse of discretion in the judge's determination that placement with the guardians would serve the child's best interests.

For these reasons, the judgment of the Juvenile Court is affirmed.

So ordered.

By the Court (Agnes, Shin & Wendlandt, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: July 1, 2019.

[8] The panelists are listed in order of seniority.